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All correspondence should be addressed to:

Dr. Michael J. Moser

Journal of International Arbitration

c/o Hong Kong International Arbitration Centre

38th Floor, Two Exchange Square, 8 Connaught Place, Hong Kong S.A.R., China

Tel: +852 3512 2398, Fax: +852 2877 0884, Email: editorjoia@kluwerlaw.com

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The Discrimination Conundrum in the Appointment of Arbitrators in International Arbitration

Umar A. OSENI & Hunud Abia KADOUF*

*The problem of discrimination in the appointment of arbitrators has recently drawn considerable amount of attention from both practitioners and researchers alike in the field of international arbitration. A number of problems endemic to international arbitrations, including that of racial biases, have already been addressed by researchers in the field. However, the issue of racial and religious discrimination is of special interest and requires serious debate. This article attempts to discuss the issue of racial and religious discrimination in light of the recent decision of the Supreme Court of the United Kingdom in *Jivraj v. Hashwani* [2011] UKSC 40. The article tries to suggest a balanced view for promoting sustainable practices in international arbitration. This article further tries to emphasize the point that while party autonomy should be respected in all cases, nevertheless, parties should not be encouraged to introduce discriminatory elements in their arbitration agreements.*

1 INTRODUCTION

The recent decision of the Supreme Court of the United Kingdom in *Jivraj v. Hashwani*,¹ legalizing discrimination on the grounds of race, religion and nationality in the appointment of arbitrators, has led to great dissatisfaction among practitioners in the field of international arbitration across the world. The decision came as a surprise to most practitioners and has, therefore, triggered more controversy than it solved. While the debate lingers on, this article attempts to reconcile the decisions of the Court of Appeal and the Supreme Court, respectively. The question to be addressed is – how can the competing views on the ongoing discrimination conundrum be reconciled to retain the sanctity of arbitral proceedings particularly in international arbitration? It is argued that if discrimination on the ground of religion or a religious sect is allowed in the appointment of arbitrators, regardless of the fact whether such appointment is

* Umar A. Oseni, LL.B., B.L., MCL, Ph.D., Assistant Professor, Ahmad Ibrahim Kulliyah (Faculty) of Laws, International Islamic University Malaysia. Hunud Abia Kadouf, LL.B., Ph.D., Dean and Professor of Law, Ahmad Ibrahim Kulliyah (Faculty) of Laws, International Islamic University Malaysia.

¹ *Jivraj v. Hashwani*, [2011] UKSC 40.

considered as a contract of services or independent provider of services, its dominant effect may eventually lead to the unhappy realization of discrimination on the grounds of nationality or race. That would certainly be counterproductive in the final analysis at a time the world is moving towards becoming a global hamlet and at a time when international arbitration is garnering an unprecedented prominence.

Against the above setting, this article is organized into five sections. The next section is a conceptual introduction to the nature of the problem. Section 3 examines what may be referred to as 'positive discrimination' in the appointment of arbitrators with reference to *Jivraj v. Hashwani*. This section briefly traces the history of the case, with an insight into the relevant facts, and the reasoning of the judges at the different stages of the dispute up to the Supreme Court. In section 4, we examine the dynamics of the intersection between arbitration and religion with some relevant discussions on the clash between the need to win the confidence of the parties and discrimination in the appointment of arbitrators. Since the *Jivraj* case relates to an Islamic sect, the section also examines the phenomenon of discrimination in Islamic arbitration. In section 5, we briefly examine the effect of a discriminatory element in an arbitration clause vis-à-vis the concept of severance in arbitration. Finally, in section 6, we propose a way forward to the ongoing discrimination conundrum based on best practices outside the United Kingdom and the European Union generally for the future sustainable practice of international arbitration.

2 'POSITIVE DISCRIMINATION' IN ARBITRATION AND *JIVRAJ V. HASHWANI*

Although there have always been some allegations of discrimination in international commercial arbitration on the ground of race with regards to the arbitral proceedings,² the latest decision of the Supreme Court of the United

² See Amazu A. Asouzu, *Arbitration in Africa* 136–37 (Cotran, Eugene & Amissah, Austin eds., Kluwer Law International 1996); G. Wilner, *Acceptance of Arbitration by Developing Countries*, in *Resolving Transnational Dispute Through International Arbitration* 283 (T.E. Carbonneau ed., University Press of Virginia 1984); Abdul Hamid El-Ahdab, *Arbitration with Arab Countries* 1 (2d ed., Kluwer Law International 1999); Giorgio Bermi, *Is there a Growing Arbitration Culture?* in *International Dispute Resolution: Towards an International Arbitration Culture*, ICCA Congress Series No. 8, International Arbitration Conference Seoul, (Oct. 12–13, 1996), with assistance of the International Bureau of the Permanent Court of Arbitration 43–44 (Albert Jan Van Den Berg ed., 1998); Jemal Ould Hamoudy Agatt, *Settlement of Petroleum Disputes through Arbitration in Saudi Arabia and Other Arab Gulf Countries: Problems and Prospects* (Unpublished Master of Comp. L. Thesis, International Islamic University 2008); M. Sonarajah, *International Commercial Arbitration* 81–101 and 122–56 (Longman 1990); K.V.S.K. Nathan, *The ICSID Convention: The Law of the International Centre for Settlement of Investment Disputes* Chs 4, 5, 7 and 8 (Juris Publishing Inc. 2000); Syed Khalid Rashid, *Some Contentious Issues in International Commercial Arbitration*, 13 Intl. Islamic Uni. Malay. L.J. 147, 148 (2005).

Kingdom specifically relates to discrimination in the appointment of arbitrators. It seems that a new dimension has been introduced to the general discourse on discriminatory tendencies in employment or contract of services. This is what we call 'positive discrimination' which favours party autonomy in appointing arbitrators even though such attitude would involve certain restrictive features that may sound discriminatory under the extant laws. Essentially, the approach established in the *Jivraj* case is commonly referred to as the pro-choice approach, which re-establishes the power of the parties to arbitration to make preliminary decisions on the types of arbitrators they desire in the event of a dispute.

Let us acknowledge that discrimination as a prejudicial treatment of an individual on the grounds of certain leanings has been a subject of debate for years.³ The extent to which discrimination, whether in economics or politics, should be allowed in a particular context is still a subject of jurisprudential controversy. Discrimination relates to the concept of equality, which has been comprehensively studied in the Aristotelian philosophy with his classification of justice into distributive and corrective justice.⁴ One would tend to agree with the Aristotelian proposition relating to the concept of distributive justice in which he proposes that, *like should be treated alike and different things differently* in issues relating to positive discrimination.⁵ The expression 'positive discrimination' is not used in terms of affirmative action, protective discrimination or what others call reverse discrimination.⁶ But it is used in its corrective sense to remedy a particular situation and give effect to party autonomy in the process of appointing and agreeing upon who should arbitrate their dispute. This takes into consideration the merits and interests of the parties while considering their specific needs even though such may amount to a form of discrimination. Tobler refers to this kind of arrangement as 'indirect discrimination'.⁷ In the following we will consider the recent decision of the UK Supreme Court in the light of the above trends of thought.

³ See A. J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, J. Empirical Leg. Stud. No. 8, 1–23 (2011); Kirby C. Wilcox & Paul W. Cane, *Arbitration of Employment Disputes* 4–90 Cal. Empl. L. (2011) 90.syn; B. William, *Gould Labor Arbitration of Grievances Involving Racial Discrimination*, 118 Uni. Pa. L. Rev. No. 1, 40–68 (November 1969); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 Hofstra Lab. L. J. 1 (1996–97).

⁴ See Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 Iowa L. Rev. 515 (January 1992) and Ronen Perry, *Critical Notice: The Third Form of Justice: Corrective and Distributive Justice: From Aristotle to Modern Times* by Izhak Englund, 23 Can. J.L. & Juris. 233 (January 2010).

⁵ Peter Westen, *The Empty Idea of Equality*, 95 Har. L. Rev. No. 3, 537–96 (January 1982).

⁶ See generally C. L. Anand, *Equality Justice and Reverse Discrimination* (Mittal Publications 1987).

⁷ Christa Tobler, *Indirect discrimination: A case study into the development of the legal concept of indirect discrimination under EC law* 19 (Intersentia 2005).

2.1 SUMMARY OF THE FACTS IN JIVRAJ

This case arose from a joint venture agreement (JVA) between Mr Jivraj and Mr Hashwani concluded on 29 January 1981. The subject matter of the JVA relates to investments in real estate and contained an arbitration clause, which provides that in the event of any dispute, three persons should be appointed to form a panel of arbitrators. Article 8 of the JVA expressly provides that:

- (1) If any dispute difference or question shall at any time hereafter arise between the investors with respect to the construction of this agreement or concerning anything herein contained or arising out of this agreement or as to the rights liabilities or duties of the investors or either of them or arising out of (without limitation) any of the businesses or activities of the joint venture herein agreed the same (subject to sub-clause 8(5) below) shall be referred to three arbitrators (acting by a majority) one to be appointed by each party and the third arbitrator to be the President of the HH Aga Khan National Council for the United Kingdom for the time being. All arbitrators shall be respected members of the Ismaili community and holders of high office within the community.
- (2) The arbitration shall take place in London and the arbitrators' award shall be final and binding on both parties.⁸

After some years a serious disagreement ensued between the parties thus necessitating the division of the assets from JVA. The parties thereupon entered into another agreement in 1988 whereby they agreed to appoint a three-man conciliation panel. This preliminary step worked well and it saw the appointment of the three-man panel comprising of three respected members of the Ismaili community that effectively facilitated and managed the division of many of the assets between October 1988 and February 1990. Nevertheless, there were still some outstanding issues between the parties that were yet to be resolved. To this end, the parties again agreed to refer the unresolved issues to arbitration or an individual conciliator who should be a member of the Ismaili community. They agreed on the appointment of Mr Zaher Ahamed, who endeavoured to conciliate the dispute but was defeated by the unwillingness of the parties to accept his decision.

What remained in dispute between the parties relates to two separate opposing claims by the parties against each other. While Mr Hashwani claimed for a balance which he alleged was due to him from the joint venture asset, Mr Jivraj claimed that Hashwani had deliberately failed to declare certain tax liabilities for which he might be held responsible for secondary liability. In 2008, Mr Hashwani instructed his solicitor to write to Jivraj. In the said letter, apart from making

⁸ Art. 8(1) and (2) of the Joint Venture Agreement between Mr Jivraj and Mr Hashwani of Jan. 19, 1981 cited in full in *Jivraj v. Hashwani*, [2010] EWCA Civ 712 and [2011] UKSC 40.

claims together with interest that have accrued over the years, Mr Hashwani's solicitor also mentioned, apparently provocatively, the appointment of Sir Anthony Colman as an arbitrator. The letter also included a firm notice to the effect that failure of Jivraj to appoint an arbitrator within seven days would lead to immediate steps to appoint Sir Colman as sole arbitrator. The claims by Mr Hashwani formed the initial spark that ignited the subsequent controversy concerning the appointment of arbitrators in accordance with Article 8 of the JVA. Mr Hashwani also made it clear that he considered that he was not bound by the condition stipulated in Article 8 of the JVA where the parties had earlier undertaken to appoint only members of the Ismaili community as arbitrators. He relied on the provisions of the UK Human Rights Act 1998, which prohibits, *inter alia*, discrimination on the ground of religious affiliation.

The fact that Sir Anthony Colman was not a member of the Ismaili community was not a contentious issue between the parties. However, the response of Mr Jivraj to this move was to invalidate the appointment of Sir Anthony Colman on the ground that he is not a member of the Ismaili community and allege such appointment violated the fundamental terms of the arbitration clause contained in the JVA. On his part, Mr Hashwani issued an arbitration claim form to activate his earlier promise of appointing Sir Anthony as a sole arbitrator pursuant to section 18(2) of the Arbitration Act 1996. He relied on the fact that, although the requirement of appointing a member of the Ismaili community as an arbitrator as contained in the arbitration clause was lawful when the JVA was made in 1981, it had now been rendered unlawful by the UK Employment Equality (Religion or Belief) Regulations 2003 (the Regulations)⁹ that were made pursuant to the EU Framework Directive on equal treatment in employment and occupation (EU Directive).¹⁰ These two applications were presented before the High Court.

2.2 POSITION OF THE COURT OF FIRST INSTANCE

In tracking the history of the case from the High Court through the Supreme Court, we will try to briefly examine the grounds of decision of each, viz., the Commercial Court, Court of Appeal, and the Supreme Court, respectively, but with special reference to the following three main issues which we think constitute the central point of the controversy:

- (1) the validity of the arbitration clause and the entire JVA, and the effect of severance;

⁹ S.I. 2003/1660.

¹⁰ EU Directive 2000/78/EC of Nov. 27, 2000.

- (2) the provisions of the Equality Act 2010 and discrimination in appointing arbitrators on the grounds of religion or nationality;
- (3) the status of the appointment of arbitrators: whether they are employees under a 'contract of service' or 'independent providers of services' who are not subordinate to the recipient of such services.

Thus, and in order to address these three intertwined issues, we will consider the decisions of each of the courts, starting with the judicial reasoning of David Steel, J. of the High Court, who determined the case at the first instance. Mr Hashwani contended that the clause in Article 8 of the JVA constitutes religious discrimination in the appointment of arbitrators and it fell foul of (i) the Employment Equality (Religion or Belief) Regulations 2003; (ii) the Human Rights Act 1998; and (iii) public policy.¹¹ The two opposing applications/arguments of the parties were presented before the Court of First Instance, which held, as summarized succinctly by Lord Clarke of the Supreme Court in the following terms:

- (i) that the term did not constitute unlawful discrimination on any of those bases and, specifically, that arbitrators were not 'employed' within the meaning of the 2003 Regulations;
- (ii) that if, nonetheless, appointment of arbitrators fell within the scope of the 2003 Regulations, it was demonstrated that one of the more significant characteristics of the Ismaili sect was an enthusiasm for dispute resolution within the Ismaili community, that this was an 'ethos based on religion' within the meaning of the Regulations and that the requirement for the arbitrators to be members of the Ismaili community constituted a genuine occupational requirement which it was proportionate to apply within regulation 7(3); and
- (iii) if that was also wrong, the requirement was not severable from the arbitration provision as a whole, so that the whole arbitration clause would be void.¹²

We shall defer the discussion on the grounds of the decision of the Court of First Instance to the next section, where we will critically compare and contrast the decisions and the grounds behind the respective positions of the Court of Appeal and the Supreme Court. The reason for this is the concurrence of the decisions of the Court of First Instance and the apex court. In other words, while keeping in

¹¹ *Jivraj v. Hashwani*, [2009] 2 All ER (Comm) 778, [2010] 1 All ER 302, [2009] EWHC 1364 (Comm), [2009] 1 CLC 962.

¹² This summarized version of the major highlights of the decision of the Commercial Court was succinctly provided by Lord Clarke in his judgment in the Supreme Court. For convenience, we will adopt Lord Clarke's summary of the decisions of the court of first instance.

view the position of the Commercial Court, we shall closely examine and juxtapose the decisions of the Court of Appeal and the Supreme Court, respectively, below for the purpose of clarity.

3 ARBITRATORS: WHETHER 'EMPLOYEES' OR 'INDEPENDENT PROVIDERS OF SERVICES'?

It should be pointed out at the outset that the authors are in support of the argument of treating the appointment of arbitrators as similar to that of judges as being more appropriate in these circumstances. For instance, when the concept of separation of powers in a democratic set-up is considered vis-à-vis the appointment of the members of the judiciary, it appears that the other two organs of the government, viz., the legislature and the executive, would also be involved in one way or the other in such appointments. But that fact alone would not necessarily preclude members of the judiciary adjudicating on disputes between the other two organs of the government. The judges do not have a contract with the parties. But the arbitrators appointed by each of the parties are nominated under some forms of contract. This thin line represents the distinction between the two positions. Nevertheless, one would further argue that the judge is also appointed squarely by the people under an indirect social contract. It is the people, who are the parties to any dispute, that elect the members of the Parliament and the sovereignty of modern democracies belong to the people. This line of argument is central to John Rawls's liberal social contract theory.¹³ In essence, the crux of the case revolves around the above consideration on the actual status of arbitrators in any proceedings. This was the major issue determined by the Supreme Court.

Meanwhile, it is important to briefly examine the provisions of the 2003 Regulations and critically examine the different standpoints of the Court of Appeal and the Supreme Court. The Regulations are to be construed in a way that gives effect to the enabling Directives.¹⁴ One of the major issues faced by the courts at different levels was the applicability of the Directives to the status of arbitrators as nominated neutral parties. The understanding of the position of arbitrators either as self-employed experts or independent suppliers of services is necessary for the determination of the applicability of the Directives to the case.

According to Lord Clarke of the Supreme Court, arbitrators are outside the scope of the 'contract of services' definition. The Supreme Court relied on the test from the European Court of Justice's decision in *Allonby v. Accrington and*

¹³ See generally John Rawls, *A Theory of Justice* (Harvard University Press 1971).

¹⁴ See *Marleasing S.A. v. La Comercial Internacional de Alimentación S.A.* (Case C-106/89) [1990] ECR I-4135. Also see *Lister v. Forth Dry Dock & Engineering Co. Ltd.*, [1990] 1 AC 546.

Rossendale College,¹⁵ where the Court of Justice followed the principles laid down in two previous cases.¹⁶ Without going into the facts of the case, it suffices to observe that the Court of Justice clearly distinguished ‘between those who are, in substance, employed and those who are “independent providers of services who are not in a relationship of subordination with the person who receives the services”’.¹⁷ The Supreme Court has therefore classified the appointment of arbitrators under the second category, which seems to be more reasonable in the spirit of a chain of judicial authorities of both the House of Lords and the Court of Justice.¹⁸ The argument of the Court of Appeal on this issue seems not to be convincing in its attempt to liken the work of arbitrators to that of an accountant or solicitor. Needless to say, a solicitor is under a contract with the client and he or she must work under the instructions of the client and mandatory provisions of the laws as a minister in the temple of justice. By contrast, judges or arbitrators, though appointed by the government or parties, as the case may be, are independent and thus do not perform their services under the direction of another person but strictly follow the provisions of the law. Solicitors and accountants are answerable to their clients while judges and arbitrators are answerable to the State. This is why the requisite provisions on impartiality and independence of arbitrators are included in the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as well as the legislations on arbitration in various countries. Going beyond merely stating that one is impartial and independent, the UNCITRAL Arbitration Rules (as amended in 2010) provide for detailed provisions on the independence of the panel once constituted individually and collectively.¹⁹ This precludes a situation where an arbitrator will still be answerable to the appointing party or perform services for and under the

¹⁵ Case C-256/01 of Jan. 13, 2004.

¹⁶ The two previous cases of the Court of Justice are *Laurie-Blum v. Land Baden-Württemberg* (Case C-66/85) [1987] ICR 483; and *Kurz v. Land Baden-Württemberg* (Case C-188/00) [2002] ECR I-10691.

¹⁷ *Jivraj v. Hashwani*, *supra* n. 1, at 53.

¹⁸ Delivering the lead judgment of the Court, Moore-Bick, L.J. observed: ‘The paradigm case of appointing an arbitrator involves obtaining the services of a particular person to determine a dispute in accordance with the agreement between the parties and the rules of law, including those to be found in the legislation governing arbitration. In that respect it is no different from instructing a solicitor to deal with a particular piece of legal business, such as drafting a will, consulting a doctor about a particular ailment or an accountant about a tax return. Since an arbitrator (or any professional person) contracts to do work personally, the provision of his services falls within the definition of “employment”, and it follows that his appointor must be an employer within the meaning of Regulation 6(1)’. See *Jivraj v. Hashwani*, *supra* n. 8.

¹⁹ For a detailed analysis of arbitrator independence and impartiality based on the provisions of the rules of prominent international arbitral bodies, see Nathalie Bernasconi-Osterwalder, Lise Johnson, & Fiona Marshall, *Arbitrator Independence and Impartiality: Examining the Dual Role of Arbitrator and Counsel* (IV Annual Forum for Developing Country Investment Negotiators Background Papers, New Delhi, Oct. 27–29 2010, available at www.iisd.org/pdf/2011/dci_2010_arbitrator_independence.pdf.) Canada: International Institute for Sustainable Development, 2011.

direction of such party.²⁰ The relationship between a solicitor and a client is purely a business relationship and cannot reasonably be likened to that of an arbitrator and the appointing party. According to Article 11 of the UNCITRAL Rules the arbitrators, once appointed, should not in any way perform their services under the direction of another person but according to the applicable rules and governing laws. The UNCITRAL Rules are emphatic on this and even go further to provide a model statement of independence pursuant to Article 11 as an annexure to the Rules in which the appointee declares his/her impartiality in very clear and unambiguous terms.

4 DISCRIMINATION ON THE GROUND OF GENUINE OCCUPATIONAL REQUIREMENT

It is pertinent to observe that there is an exception to the rule against discrimination in employment as provided in the 2003 Regulations. This is what is generally known as the 'genuine occupational requirement'. Most countries across the world have their special laws, regulations or policies on genuine occupational requirements. These requirements come into play only when there is direct discrimination as it is difficult to ascertain an indirect discrimination in employment, especially in cases where the employer imposes certain conditions or stipulates a number of criteria for the job.²¹ The relevant provisions on genuine occupational requirement are contained in regulation 7(3) of the 2003 Regulations, which domesticates the exceptions enumerated in Article 4 of the EU Directive. Regulation 7(3) provides:

This paragraph applies where an employer has an ethos based on religion or belief and, having regard to that ethos and to the nature of the employment or the context in which it is carried out—

- (a) being of a particular religion or belief is a genuine occupational requirement for the job;
- (b) it is proportionate to apply that requirement in the particular case; and
- (c) either—

²⁰ Arts. 8–10 of the UNCITRAL Arbitration Rules (as amended in 2010) provide for the appointment of either a sole arbitrator or a three-member arbitral panel. However, in a multi-party arbitration which may involve more than two parties or situations where the parties desire to appoint more arbitrators, party autonomy is emphasized. The parties must agree upon a method for appointing such arbitrators.

²¹ Gwyneth Pitt, *Genuine occupational requirements*, in *EC Anti-Discrimination Legislation for Legal Practitioners* 1 (unpublished ms. Apr. 27–28, 2009).

- (i) the person to whom that requirement is applied does not meet it, or
- (ii) the employer is not satisfied, and in all the circumstances it is reasonable for him not to be satisfied, that that person meets it.²²

While this aspect of labour law is still evolving, it suffices to observe that the situation in *Jivraj*'s case may be classified outside the scope of the genuine occupational requirement exception.

For all intents and purposes, arbitrators are not employees of their appointing authorities or the parties. So, the application of the 2003 Regulations and its enabling EU Directive does not come into play in the case under consideration. The position of the High Court and the affirmation of this position by Lord Clarke in the Supreme Court seem to be more appropriate. The issue of genuine occupational requirement does not arise when it comes to this case, as the relevant provisions of the 2003 Regulations do not apply. According to Lord Clarke, 'the Regulations are not applicable to the selection, engagement or appointment of arbitrators . . . If the above conclusion is correct, this point [applicability of the Regulations] does not arise but it was fully argued' by the parties during the trial.²³ While genuine occupation requirement may require some form of discrimination in employment, such issue does not arise in *Jivraj*. Therefore, one can reasonably conclude that discrimination on the ground of genuine occupational requirement does not arise in international arbitration, particularly in the appointment of arbitrators. This is entirely ruled out on the premise we earlier established regarding the status of arbitrators, who cannot rationally be considered as employees of their appointing authority.

The genuine occupational requirement could be invoked in situations where the appointment of arbitrators is considered as employment. This could occur in specialized arbitrations such as outer space activities arbitration or Islamic finance arbitration where the proceedings require genuine occupation expertise in the specialized field of arbitration.²⁴ For instance, the Optional Rules for Arbitration of Disputes Relating to Outer Space Activities issued by the Permanent Court of Arbitration (PCA) on 6 December 2011 focus on specialized outer space

²² The above provisions in the 2003 Regulations were made in accordance with the exceptions enumerated in Art. 4 of the EU Directive which provides: 'Notwithstanding Articles 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.'

²³ [2011] UKSC 40, 60.

²⁴ For instance, the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) issued its standard on arbitration specifically for arbitration of cases relating to Islamic finance transactions.

arbitration. Article 10(4) of the new rules provides that the Secretary-General of the PCA will make a list of persons considered as having expertise in outer space activities available to the parties when constituting the arbitral tribunal.²⁵ Having said this, it is important to reiterate the fact that arbitrators are not employees of their appointing authority and so the exception of genuine occupational requirement for employees as contained in the EU Directive and 2003 Regulations does not arise. However, such occupational requirement is always an important consideration generally in specialized occupations or services, whether as employees or professionals who provide independent services.

5 ARBITRATION, RELIGION, AND DISCRIMINATION

The intersection between religion and arbitration and the consideration of some elements of discrimination is worth exploring with special reference to the Islamic arbitration law. The *Jivraj* case presents a situation where the arbitration clause was considered by some as discriminatory on the ground of religion. The central thought-provoking question is to what extent such an exclusionary provision may be allowed in arbitration? An additional factor that must be considered with the foregoing question is confidence in the arbitration panel. Are parties more satisfied with and indeed more confident in the proceedings and subsequent award of a panel composed of arbitrators of the same faith as them? If the arbitration panel and parties are members of the same religion, would that lead to smooth proceedings? Can parties legally stipulate in the arbitration clause contained in a contract that in the event of a dispute the arbitration panel must be composed of highly qualified arbitrators who are of the same religion with them, as in the instant case? In answering the foregoing questions, we shall briefly take a quick look at the relevant Islamic arbitration rules or principles because these are the readily available faith-based rules of arbitration common in the modern world.²⁶

²⁵ Art. 10(4) provides: 'In appointing arbitrators pursuant to these Rules, the parties and the appointing authority are free to designate persons who are not Members of the Permanent Court of Arbitration at The Hague. For the purpose of assisting the parties the Secretary-General will make available a list of persons considered to have expertise in the subject matters of the dispute at hand for which these Rules have been designed.'

²⁶ Islamic arbitration is now being practised in London based on private initiatives by Muslims who feel they have unique principles for dispute resolution, particularly in family disputes. However, Shari'ah arbitration has been a controversial issue in Canada. For more on this, see Trevor C.W. Farrow, *Re-Framing the Sharia Arbitration Debate*, 15 Const. Forum No. 2, 79–86 (2006); Ori Aronson, *Out of Many: Military Commissions, Religious Tribunals, and the Democratic Virtues of Court Specialization*, 51 Va. J. Int'l L. 231, 240–42 (Winter 2011); Michael C. Grossman, *Is This Arbitration?: Religious Tribunals, Judicial Review, and Due Process*, 107 Colum. L. Rev. 169 (2007); Dieter Grimm, *Religion and Constitutional Adjudication: Conflicts Between General Laws and Religious Norms*, 30 Cardozo L. Rev. 2369, 2377, 2381 (2009); Donald Brown, *A Destruction of Muslim Identity: Ontario's Decision to Stop Shari'a-Based Arbitration*, 32 N.C.J. Int'l L. & Com. Reg. 495 (2007); Jehan Aslam, *Judicial Oversight of Islamic Family*

5.1 APPOINTMENT OF ARBITRATORS: BETWEEN CONFIDENCE AND DISCRIMINATION

In order to determine whether there is a causal link between faith-based arbitrations and confidence, there may be a need for a further empirical research. However, this article looks at the daunting task of balancing the significance of confidence as a phenomenon in arbitral proceedings and the effects of discrimination in the landscape of international arbitration, particularly at a time when the number of cross-border transactions and cross-cultural arbitrations is exceedingly high. There is no doubt that private dispute settlement such as arbitration is all about confidence in the neutrals. The parties must have full confidence in the neutrals they invite to arbitrate their dispute. Parties only appoint people they trust, and thus incorporate the details of such appointments in their arbitration clause within the underlying contract to protect themselves as well as their business. But it sometimes turn out that such specific provisions in the arbitration clause may be exclusionary in nature and may thus be considered as discriminatory.

After constituting the panel of arbitrators, allegations of bias have arisen in international arbitration. This has been considered as one of the contentious issues facing international commercial arbitration in recent times. But reasonable steps have been taken by some regional and international arbitral institutions to prevent this.²⁷ Nevertheless, this issue of racial bias is sucking up all the oxygen in international arbitration and it further boils down to the question of confidence of the parties in the arbitration panel. While most arbitration rules are geared towards ensuring the confidence of parties in the process, the reality in practice seems to present a different picture. Ethical issues are still being raised in arbitral proceedings and these are unfortunately withering away the modicum of trust people have in arbitration as a sustainable process of dispute resolution.²⁸

Confidence in a process seems to be the driving force for attaining success and satisfaction. The same is true for arbitration. In a survey conducted in respect of about 400 business attorneys in Southern California in November 2005 to determine their perceptions on the preference of litigation over arbitration for the resolution of civil disputes, a good number of the respondents revealed their bad

Law Arbitration in Ontario: Ensuring Meaningful Consent and Promoting Multicultural Citizenship, 38 N.Y.U.J. Int'l L. & Pol. 841 (2006); Caryn Litt Wolfe, *Faith-Based Arbitration: Friend or Foe? An Evaluation of Religious Arbitration Systems and Their Interaction with Secular Courts*, 75 Fordham L. Rev. 427, 441 (2006).

²⁷ Umar A. Oseni, *A Comparative Legal Analysis of the Role of Arbitration in Maritime Dispute Resolution* (unpublished Master of Comparative Law Dissertation, Intl. Islamic Uni. Malay., 2009).

²⁸ For a detailed analysis of the ethical issues and concerns in arbitration, see Robert A. Giacalone, Martha L. Reiner, & James C. Goodwin, *Ethical Concerns in Grievance Arbitration*, 11 J. Bus. Ethics No. 4, 267–72 (April 1992).

experiences in arbitration. One striking finding of the survey was the lack of confidence in arbitrators as reliable decision-makers.²⁹ One may argue that the attorneys are wrong in their conclusion, but the reality is that even if we disagree with them, there is clearly some truth in the findings. The findings may not be true for all arbitrators, as there are many respectable, unbiased and incorruptible arbitrators across the globe. It seems the malignant reputation of the 'rotten apples in the barrel' is now affecting the cream of international practice of arbitration.³⁰ The confidence and trust people have in the *crème de la crème* of arbitration practice must remain and be enhanced. The stakeholders in the international landscape of arbitration must ensure that the wheat grains are separated from the chaff to restore the age-old confidence in the effectiveness of arbitration as a sustainable dispute resolution process. This can be achieved through the 'tightening of arbitrator ethics'.³¹ The magic word remains 'ethics'. It is of note that some international arbitration institutions consistently review their codes of ethics for arbitrators.

In order to determine whether there is a causal link between confidence in arbitral proceedings and the religious beliefs of the parties, three distinct practices of non-conventional arbitration will be closely examined. They are: (i) customary arbitration as practised in some countries in Africa; (ii) Christian arbitration; and (iii) Shari'ah arbitration. These three important practices in different parts of the world that relate to arbitration have a common denominator – religious belief. The causal link between confidence and religion in these forms of arbitration, if any, will be examined below through empirical-analytical means.

First, customary arbitration is an age-old practice in ancient communities, particularly in Africa and Asia, which has its basis in primordial traditional religious beliefs. Arbitration as a process of dispute settlement has been part of the traditional norms of most communities in Africa. For instance, in Nigeria '[r]eferral of a dispute to one or more laymen for decision has deep roots in the Customary Law of many Nigerian communities'.³² Most family disputes are subject to informal customary arbitration in the market square by respectable elders of the community. Arbitration is indigenous to most African communities.³³ In a similar vein, native customary arbitration was officially recognized in Ghana in *Ekua Ayafie*

²⁹ Rebecca Callahan, *Arbitration v. Litigation: The Right to Appeal and Other Misperceptions Fueling the Preference for a Judicial Forum* 3 and 33 (bepress Legal Series, Working Paper No. 1248, Apr. 7, 2006, available at <http://law.bepress.com/expresso/eps/1248>).

³⁰ See Harold W. Davey, *Hazards in Labor Arbitration*, 1 Indus. & Lab. Rel. Rev. 386 (1947–48).

³¹ Jay Folberg, *Arbitration Ethics: Winds of reform blowing from the West?* 9 Disp. Resol. Mag. 5 (2002–03).

³² Samuel Oduh Ezediaro, *Guarantee and incentive for foreign investment in Nigeria*, 5 Intl. L. 770, 775 (1971).

³³ Virtus Chitoo Igbokwe, *The Law and Practice of Customary Arbitration in Nigeria: Agu v. Ikwibe and Applicable Law Issues Revisited*, 41 J. African L. 201, 202 (No. 2, 1997).

v. Kwamina Banyea,³⁴ where Bailey, C.J. considered the native customary arbitration and the subsequent award as material facts in the case.³⁵ In Sudan, chiefs and sub-chiefs resolve all forms of disputes on a daily basis and their decisions are binding on the parties based on the confidence people have in their local leaders and the process they adopt in resolving their disputes.³⁶ Most land and family disputes are resolved through these customary arbitration processes.³⁷ The crowning point of the customary arbitral process is oath-taking which oftentimes attract serious consequences in the event of non-compliance with the award on the part of either of the parties. Thus, the people religiously believed in such awards and they had full confidence in the process. The confidence they had in the process and final award is reinforced by their strict religious and traditional beliefs. This was the prevailing customary arbitration practised widely across Africa until the colonial period, which ushered in a new formal process of dispute settlement.³⁸ Even though pockets of such customary practices are still seen across the continent, the litigation process is now the dominant method of dispute settlement.³⁹ It will be surprising to observe that, though customary arbitration in Africa does not have written rules as prevalent in the modern practice of arbitration, the rules are strictly observed in their entirety because of the devastating effects of the attendant repercussions of the smallest item of violation. This is where the element of confidence in the process and the arbitrators is evinced as a causal effect of traditional religious beliefs.

Second, similar to the customary arbitration model in Africa, another form of arbitration came to prominence in the twilight of the twentieth century. What later came to be known as Christian arbitration and conciliation was introduced based on the teachings and values of Christianity.⁴⁰ In an empirical study carried out by Ibrahim et al., a number of Christian-based companies in the United States were studied. One of the firms revealed that they included what it referred to as ‘a

³⁴ Sar. F.L.R. 88 [1884].

³⁵ J. N. Matson, *The Supreme Court and the Customary Judicial Process in the Gold Coast*, 2 The Intl. & Comp. L. Q. No. 1, 47, 56 (January 1953).

³⁶ Alexander P. Danne, *Customary and Indigenous Law in Transitional Post-Conflict States: A South Sudanese Case Study*, 30 Monash U. L. Rev. 199 (2004).

³⁷ Domenico Polloni, *Land and the Sudanese transition to Peace*, 24 Forced Migration Review 21 (2005), available at www.fmreview.org/textOnlyContent/FMR/24/09.htm.

³⁸ Abdulmumini A. Oba, *Juju Oaths in Customary Law Arbitration and their Legal Validity in Nigerian Courts*, 52 J. Afr. L. No. 1, 139, 140 (2008).

³⁹ See Olubayo Oluduro, *Customary Arbitration in Nigeria: Development and Prospects*, 19 Afr. J. Int'l & Comp. L. 307–30 (2011).

⁴⁰ The Holy Bible, Mathew 5: 25 says ‘Settle matters quickly with your adversary who is taking you to court. Do it while you are still with him on the way or he may hand you over to the judge, and the judge may hand you over to the officer, and you may be thrown into prison.’

Christian arbitration clause in the engagement letter'.⁴¹ About 58% of the companies emphasized the importance of maintaining good business relationship with their suppliers and customers. With regard to their suppliers, one of the techniques they adopted in sustaining their relationship with them was the use of 'a "Christian" arbitration clause in contracts'.⁴² These self-described Christian companies tried to establish an interface between corporate responsibility and religion and this had considerably enhanced their service delivery. 'Many of the companies (45%) stressed the importance of product or service quality, and (46%) emphasized various employee-centered values and behaviors such as the "golden rule", kindness, generosity, integrity, cooperation, and trust.'⁴³ Devout Christians preferred their services to other companies in their communities based on the confidence they had in them. The Church has played an important role in dispute settlement over the years, which comprises mediation, conciliation and arbitration in different forms, and the confidence the churchgoers have in the priests has prevented any problem of enforceability of any decision.⁴⁴ This also excludes the element of discrimination, both in the process and the church arbitrators.⁴⁵ With the decline of the Church, people turned to the formal system of administration of justice, which proved to be adversarial and counterproductive in the final analysis. People later lost confidence in the adversarial system of litigation and then turned to alternative dispute resolution. This was clearly described in the Report on the State of Judiciary in 1982, where Chief Justice Warren Burger precisely observed:

One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal 'entitlements'. The courts have been expected to fill the void created by the decline of church, family and neighborhood unity.⁴⁶

In order to regain its position, the Church has introduced a number of programmes for amicable dispute settlement. There is now what is called Christian

⁴¹ Nabil A. Ibrahim et al., *Characteristics and Practices of "Christian-Based" Companies*, 10 J. Bus. Ethics No. 2, 123, 129 (February 1991).

⁴² *Id.* at 130.

⁴³ *Id.* at 127.

⁴⁴ In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 131 S. Ct. 1783 (2011), the Supreme Court of the United States, while granting the petition for writ of *certiorari* for the Sixth Circuit's decision, explained some of the principles of dispute settlement in Christendom. See Samuel J. Levine, *Hosanna-Tabor and Supreme Court Precedent: An Analysis of the Ministerial Exception in the Context of the Supreme Court's Hands-off Approach to Religious Doctrine*, 106 Nw. Uni. L. Rev. Colloquy 120-37 (2011).

⁴⁵ Lee Tarte, *Clergy Arbitrator Liability: A Potential Pitfall of Alternative Dispute Resolution in the Church*, 32 Cath. Law. No. 4, 310-36 (1988-89).

⁴⁶ Chief Justice Warren Burger, *Annual Report on the State of Judiciary*, A.B.A.J. 68 (March 1982).

Conciliation.⁴⁷ The Institute for Christian Conciliation (ICC) defines ‘Christian Conciliation’ as a ‘process for reconciling people and resolving disputes out of court in a biblical manner’.⁴⁸ The ICC also utilizes other processes of dispute settlement such as negotiation, mediation and arbitration. In fact, it uses a multistep clause where the processes are structured as a process. As a result of the religious undertone of the process, most parties accept the decisions, settlements and awards wholeheartedly without any bias or discrimination. This is based on the confidence they have in the neutrals and arbitrators who are respected people within the wider community of Christendom. As a result, ‘commercial cases are settled 80% to 90% of the time in mediation’ without the need to proceed to the binding arbitration phase.⁴⁹ This also explains the causal nexus between arbitration and religious beliefs.

Third, Shari‘ah or Islamic arbitration, which is associated with Islamic principles, has gained prominence in recent times, particularly in the West amongst the Muslim communities. These communities in many Western countries have continued to revive traditional principles of their religion, which would promote peaceful coexistence in their communities. One of such mechanisms is the structuring of amicable dispute resolution processes in Islamic law to fit their modern existential needs.⁵⁰ Many private dispute settlement tribunals, which are Shari‘ah-oriented, have been springing up since the beginning of the twenty-first century across the world.⁵¹ While some of them are institutionalized initiatives connected to a mosque or an Islamic cultural centre, others are mainly ad hoc. Given the historical relevance of arbitration in Islam and the recognition given to it in the Qur’an, arbitration is one of the most important processes of dispute resolution in Islam.⁵² Confidence in the process is one of the most important features emphasized in the Qur’an.⁵³ The confidence adherents of the Islamic faith

⁴⁷ Some of the Christian Conciliation cases include *Encore Productions, Inc. v. Promise Keepers*, 53 F. Supp.2d 1101 (D. Colo. 1999) and *Woodlands Christian Academy v. Logan*, 1998 WL 257002 (Tex. Ct. App. May 21, 1998) (No. 09-97-348-CV).

⁴⁸ Institute for Christian Conciliation, Guidelines for Christian Conciliation 1 (rev. Aug. 3, 1989) cited in Glenn G. Waddell & Judith M. Keegan, *Christian Conciliation: An Alternative to “Ordinary” ADR*, 29 Cumb. L. Rev. 583, 584, n. 8 (1998–99).

⁴⁹ Waddell & Keegan, *id.* at 583, 598.

⁵⁰ It is observed that though the general principles of arbitration in Islamic law are the same, there are still some jurisprudential differences on certain issues of the procedural aspect of arbitration among Muslim jurists. However, Islamic arbitration in the modern era is part of the general Islamic revival witnessed over the years, particularly in the twentieth century after the fall of the Ottoman empire. See Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 Vand. L. Rev. 609 (2006).

⁵¹ Mona Rafeeq, *Rethinking Islamic Law Arbitration Tribunals: Are they Compatible with Traditional American Notions of Justice?* 28 Wis. Intl. L. J. no. 1, 108–39 (2010).

⁵² See Aida Othman, ‘And Amicable Settlement is Best’: *Sulh and Dispute Resolution in Islamic Law*, 21 Arab L. Q. 64–90 (2007).

⁵³ In one of the main verses in the Qur’an prescribing arbitration as a sustainable means for dispute resolution, confidence in the arbitrator or arbitral panel is typified thus: ‘But no, by the Lord, they can have no [real] Faith, until they make you [the Prophet] judge in all disputes between them, and find in

have in their religious leaders is transferred to the arbitration process. So, when such spiritual leaders issue an award, parties are more inclined towards accepting such decisions without challenging such decisions in any other forum.

The most prominent model of the modern practice of Shari'ah arbitration is the initiative of the Islamic Institute of Civil Justice (IICJ), which has prompted much controversy amongst legal experts and the media. Without going into the legal and political dynamics surrounding the initiative, it suffices to observe that the IICJ is a private tribunal that arbitrates related family and other disputes in accordance with the principles of Islamic law.⁵⁴ In contrast to the conclusion reached by Provins, where she contends that women may be pressurized to consent to Shar'ia arbitration,⁵⁵ Muslims willingly accept the Islamic law as part of their lives. So, whether the parties are men or women, accepting the jurisdiction of an arbitration tribunal is part of the religious beliefs of Muslims if such tribunal is just, fair and transparent in its proceedings. It is the religious idiosyncrasies of the Muslims that guide their acceptance of highly respected members of the Muslim communities as reliable decision-makers. Just like other religious convictions discussed above, the driving force amongst the Muslims is the confidence they have in their religious leaders, which is derived from their religious convictions.

A good example of this conclusion is the case of the Independent Shari'ah Tribunals in Lagos (Nigeria).⁵⁶ Since there are no Shari'ah courts in southern Nigeria, Muslims have introduced these private arbitration tribunals to apply Islamic law to disputes submitted before them by parties on a voluntary basis.⁵⁷ Though it is also a private initiative among the Muslims, unlike the Ontario experience, it has published its award/decisions. From the analysis of the decisions, '[s]ince 2002, over 500 cases have been heard and determined by the Panel and parties' satisfaction with the proceedings of the Panel has soared to about 90% over the years.'⁵⁸ This trend is indicative of the confidence shown by the parties in the learned members of the tribunal. From our findings, people feel more comfortable with learned members of their religion in

their souls no resistance against your decisions, but accept them with the fullest conviction.' (Qur'an 4: 65). See Ahmed Zaki Yamanai, *Humanitarian International Law in Islam: A General Outlook*, in *Understanding Islamic Law: From Classical to Contemporary* 78 (Hisham M. Ramadan ed., AltaMira Press 2006).

⁵⁴ Marie Egan Provins, *Constructing an Islamic Institute of Civil Justice that Encourages Women's Rights*, 27 *Loy. L.A. Int'l & Comp. L. Rev.* 515, 52 5(2005).

⁵⁵ *Id.* at 527.

⁵⁶ The Independent Shari'ah Tribunal was set up by the Supreme Council for Shari'ah in Nigeria in 2002. Other states in Southwestern Nigeria have followed suit with different private initiatives to adopt the Shari'ah dispute settlement. For a detailed analysis of the activities of the tribunal, see Umar A. Oseni, *The Legal Framework for Alternative Dispute Resolution in Courts with Shari'ah Jurisdiction in Nigeria, Malaysia and Singapore*, 152–57 (unpublished Ph.D. Thesis, Intl. Islamic Uni. Malay., 2011).

⁵⁷ Philip Ostien & Albert Dekker, *Sharia and National Law in Nigeria*, in *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* 577 (Jan Michiel Otto ed., Leiden University Press 2010).

⁵⁸ Oseni, *supra* n. 56, at 152–53.

matters of dispute settlement than is the case in any other process. Similarly, the Islamic Shari'ah Council (ISC) operates an arbitral tribunal in the United Kingdom to serve as a platform for the resolution of family disputes in accordance with principles of Islamic law.⁵⁹ Though most of these tribunals have been greeted with a lot of criticism, the fact remains that religion is a driving force towards building confidence in an arbitral tribunal. If people do not have confidence in the proceedings, we wonder how the ISC was able to handle over 7,000 cases since its inception in 1982.⁶⁰ There also exists the Muslim Arbitration Tribunal (MAT) which is a dispute settlement body established under the U.K. Arbitration Act 1996 and Islamic law.⁶¹ The decisions of MAT are enforceable in the county courts or High Court.⁶² Similar initiatives have been introduced in the United States in the form of community-based arbitration organized and coordinated by Muslim leaders in community mosques.⁶³ This has promoted peaceful coexistence and social cohesion among these Muslim communities.⁶⁴

It is clear that there is a common element in the above models, that is, confidence and trust. It appears that the element of discrimination is outstripped and overshadowed by confidence and trust in both the presiding panels and the process itself. Similarly, the case that brought to prominence the subject matter of this article is also related to the issue of confidence in highly respected members of the same faith. When the parties, Jivraj and Hashwani, concluded the JVA in 1981, as members of the Ismaili sect of Islam, they agreed to appoint three arbitrators who are respected members of the Ismaili community. The Ismaili community is a religious sect, which has its own apparatus for amicable dispute resolution that the members preferred in their dealings. If we may probe into the reason why they agreed to this, it will be revealed that they had more confidence in their religious community and therefore gave exclusive preference to such community in the choice of arbitrators. Members of such religious bodies often believe they are not discriminating against outsiders, but are rather just demonstrating the confidence they have in one another. In fact, such 'positive discrimination' transcends the

⁵⁹ Lucy Carroll, *Muslim women and "Islamic divorce" in England*, 17 J. Muslim Minority Aff. No. 1, 97–115 (1997).

⁶⁰ Islamic Sharia Council, Statistics, available at www.islamic-sharia.org/about-us/about-us-9.html.

⁶¹ MAT handles cases that relate to forced marriages, domestic violence, family disputes, commercial and debt disputes, inheritance disputes and mosque disputes. MAT enjoys the full endorsement of Lord Chief Justice Phillips. In his speech on 'Equality Before the Law', he emphasized that 'There is no reason why principles of Sharia Law, or any other religious code should not be the basis for mediation or other forms of alternative dispute resolution.' Lord Phillip, *Equality Before the Law* (East London Muslim Centre, Jul. 3, 2008, available at www.matribunal.com/initiative_lcj_transcript.html).

⁶² Matthew Hickley, *Islamic Sharia Courts in Britain are now "Legally Binding"* www.dailymail.co.uk/news/article-1055764/Islamic-sharia-courts-Britain-legally-binding.html (Sep. 15, 2008).

⁶³ Irshad Abdal-Haqq & Qadir Abdal-Haqq, *Community-based Arbitration as a Vehicle for Implementing Islamic Law in the United States*, 1 J. Islamic L. 61–88 (1996).

⁶⁴ See Trumbull, *supra* n. 50, at 609–47.

appointment of arbitrators. Even in the choice of spouses, most religious adherents prefer their co-adherents to others who are outside the general ambit of their religious leanings.

5.2 ISLAMIC ARBITRATION: DISCRIMINATION IN THE APPOINTMENT OF ARBITRATORS

Giving the whole hullabaloo generated by the *Jivraj* case amongst practitioners, one may turn to Islamic arbitration with a view to considering the attitude of Islamic law in issues that may constitute discrimination in an arbitration agreement, such as religion, race, and nationality. Since Islamic law recognizes arbitration as a sustainable process of dispute resolution, there should be reference to qualification of arbitrators. We will examine the relevant features of Islamic arbitration with particular reference to the appointment of arbitrators and subsequently probe into some contemporary applications of some of those principles, as generally practised by Muslims. Notably, there are many principles and procedural rules involved in Islamic arbitration.⁶⁵ However, our focus here is to examine the applicable rules on the appointment of arbitrators only with the view to determine whether there is any element of discrimination which might have prompted the parties in the *Jivraj* case to initially exclude the appointment of non-members of the Ismaili community as arbitrators. In our quest to ascertain the position of this Ismaili Muslim community on the appointment of arbitrators, we had recourse to the Constitution of the sect. While Article 12 of the Constitution provides for an International Arbitration and Conciliation Board,⁶⁶ Article 13 provides for the National Arbitration and Conciliation Board and there is no mention of the appointment of arbitrators since these are assumed to be standing boards with permanent members.⁶⁷ While Article 13.4(e) of the Ismaili Constitution empowers the Boards to make rules of procedure for the conduct of arbitration and conciliation, the Canadian National Arbitration and Conciliation Board has set out the Rules for Arbitration.⁶⁸ Rule 4 provides for the composition of the arbitration panel. Though the Rules allow the appointment of any individual, whether or not a member of the Arbitration Board provided that the

⁶⁵ For a detailed examination of all the principles and procedural rules, see El-Ahdab, *supra* n. 2, at 23–54.

⁶⁶ Article 12.3 of the Ismaili Constitution provides, in respect of the International Arbitration and Conciliation Board: 'The Chairman and other members of the International Conciliation and Arbitration Board shall be appointed for a term of three years.'

⁶⁷ Art. 13.3 of the Ismaili Constitution provides, in respect of the National Arbitration and Conciliation Board: 'The Chairman and other members of the National Conciliation and Arbitration Board shall be appointed for a term of three years.'

⁶⁸ These Rules have been published in the Appendix to Marion Boyd, *Dispute resolution in family law: Protecting choice, promoting inclusion* 163–75 (Ministry of the Attorney General 2004).

parties agree, there is no indication as to whether a non-Ismaili member can be appointed.⁶⁹ The relevant word here is 'anyone' which may mean a non-Ismaili. However, it seems this may not be possible when one draws inferences from other related provisions, such as the issue of legal representation in the Rules, where it is expressly stated that apart from seeking a written consent of the arbitration panel, 'the named representative . . . should preferably be an Ismaili'.⁷⁰

As regards the appointment of arbitrators in popular Sunni Islamic law, most Muslim jurists agree that an arbitrator should necessarily have similar qualifications to that of a judge in terms of knowledge, expertise, experience, moral probity and uncompromising sense of justice. These requirements should apply *mutatis mutandis* to arbitration.⁷¹ However, the position of an arbitrator is more restricted than the extended jurisdiction and powers of a judge.⁷² The views of the Muslim jurists are summarized by Zahraa and Abdul Hak:

Most of the schools of jurisprudence require that the arbitrator must be a Muslim. Their view is based on the argument that the testimony of a non-Muslim is not admissible against a Muslim, which impliedly takes into account the similarity between the arbitration process and the testimony process. They also rely on a verse in the Qur'an, which explicitly denies non-Muslims any authority over Muslims. The Hanafi School, however, allows *dhimmis* (non-Muslim citizens) to appoint an arbitrator from their own community. According to this School, it is permissible for a non-Muslim to give evidence involving their own affairs, and as such they can be appointed as arbitrators.⁷³

A *dhimmi* is either a Christian or a Jew. A non-Muslim is not necessarily a *dhimmi*.

When situating the rules of Islamic arbitration in the contemporary context, one discovers only a few bodies that have in practice issued rules of arbitration, which as a matter of course includes applicable provisions on the appointment of arbitrators and their qualifications. Apart from the direct emphasis on the expertise and knowledge of the Shari'ah on the part of the judge and arbitrator, the *Mejelle*, the codified legislation of the Ottoman Empire, did not single out religion as a

⁶⁹ Rule 4.1 of the Rules for Arbitration of Canada (for the Ismaili Community) provides: 'The Chairman of the Arbitration Board shall (unless otherwise agreed by the parties) meet with the parties to the arbitration to select the Arbitration Panel, which shall be composed of: (a) any one individual, whether or not a member of the Arbitration Board, upon whom the parties and the Chairman of the Arbitration Board unanimously agree and who himself agrees, should be the sole member of the Arbitration Panel; or (b) any three individuals, of whom one at least shall be a member of the Arbitration Board, on all of whom the parties unanimously agree, and who themselves agree to act as the Arbitration Panel; or (c) failing agreement under Rule 4.1(a) or 4.1(b) either one or three members of the Arbitration Board as the Chairman of the Arbitration Board shall designate.'

⁷⁰ See rule 5.2. of the Rules for Arbitration.

⁷¹ Samir Saleh, *Commercial Arbitration in the Arab Middle East* 35 (Graham & Trotman 1984).

⁷² Mahdi Zahraa & Nora A. Hak, *Tahkim (Arbitration) in Islamic Law within the Context of Family Disputes*, 20 Arab L. Q. No. 2, 14 (2006).

⁷³ *Id.* at 16.

requirement for potential arbitrators.⁷⁴ In a similar vein, the Arbitration Standard of the Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) adopts a liberal attitude, especially in issues that involve financial contracts.⁷⁵ According to the AAOIFI standard, non-Muslims who have the requisite expertise in Islamic finance and Islamic commercial law generally may be appointed as arbitrators. The position of the AAOIFI Shari'ah Standard is summarized thus:

Though in principle, an arbitrator in an Islamic finance dispute should be a Muslim, the appointment of a non-Muslim arbitrator is allowed in acute need if such will serve the ends of justice with a Shari'ah-accepted award.⁷⁶ The only proviso to this rule is given in Article 11(1) of the standard, which explicitly provides that for an arbitration award to be valid, it must conform to the rules of Islamic law. This is reiterated in Article 9(4), which mandatorily requires the arbitrator or the arbitral panel to apply the rulings of Islamic law in both its procedural and substantive dealings.⁷⁷

It is clear that the element of discrimination does not hold sway in the modern practice of Islamic arbitration. The only consideration, which is present in different statutory provisions and rules all over the world, is expertise in the subject matter of the dispute regardless of one's nationality, race or religion. It is expected that any arbitrator that is appointed must be duly qualified under the Shari'ah with sound knowledge of Islamic law and considerable experience in the practice of Islamic arbitration with the capacity to define legal rules as provided for in the principles of Islamic jurisprudence. This is also akin to what is obtainable in the Procedure Rules of the MAT in the United Kingdom. Rule 10(1) of the Rules provides for the minimum requirement in the composition of the tribunal. Any panel must include a person learned in Islamic law and another who is a solicitor or barrister of England and Wales.⁷⁸ There is no mention of the national, racial or religious background of the potential arbitrators. What is required under the Rules is sound knowledge of Islamic law which is usually the governing law of the proceedings, and another member who is legally qualified as a solicitor or barrister of England and Wales, because most cases coming before the tribunal involve some

⁷⁴ See C.R. Tyser, D.G. Demetriades, & Ismail Haqqi Effendi, *The Mejelle* (Being an English Translation of *Majallah el-Ahkam-l-Adliya* and a Complete Code of Islamic Civil Law) 318 (The Other Press 2007).

⁷⁵ The Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) is an international standard-setting body for Islamic financial institutions across the world. Over 180 financial institutions offering Islamic products in over 46 countries have adopted these standards. The standards include up to 70 accounting, auditing, governance, ethics and Shari'ah standards.

⁷⁶ Art. 8(2) of the AAOIFI Arbitration Standard.

⁷⁷ Umar A. Oseni, *Dispute Resolution in Islamic Finance: Current Trends and Future Perspectives* 26 (Second Lecture of the 2011–2012 Lecture Series of the Islamic Legal Studies Program, Har. L. Sch. Nov. 9, 2011).

⁷⁸ Rule 10 (1) of Procedure Rules of MAT provides: 'The Tribunal shall consist of as a minimum a: 1. Scholar of Islamic Sacred Law; 2. Solicitor or Barrister of England and Wales.'

elements of local laws which may not be discountenanced provided they do not contradict the principles of Islamic law.

6 EFFECT OF A DISCRIMINATORY ELEMENT IN AN ARBITRATION CLAUSE

Can an aspect of the arbitration clause be severed from other aspects if it contains an element which the court deems to be discriminatory? The general principles of severability are very clear with respect of a contract, which requires the excision of a defective part that does not substantially affect other parts and more importantly the arbitration clause. In this case, the court is required to 'blue pencil' such invalid part of the contract and must be convinced that such excision does not substantially affect the scope of the agreement in a cancerous manner. The Supreme Court decision in *Jivraj* case has triggered a further jurisprudential probe into the effect of a discriminatory element in an arbitration clause. It is of note that in *Jivraj*, the Supreme Court refused to correct the finding of the invalidation of the whole arbitration clause by the Court of Appeal on the basis of the discriminatory element, which was earlier considered differently by the Court of First Instance. It should be recalled that in the Court of Appeal, the question of severance was raised and the court considered whether the arbitration clause failed completely or whether there can be some constructive amendment by severing the requirement that the arbitrators be appointed from among the members of the Ismaili community, leaving the arbitration clause otherwise intact. The Court of Appeal, relying on *Marshall v. NM Financial Management Ltd.*,⁷⁹ emphasized that it is possible to sever the discriminating element in the arbitration clause in a way that would not render the remainder substantially different from what the parties initially intended. The court affirmed party autonomy, interest and the ultimate ends of justice while applying the principle of severance. In *Marshall's* case, the conditions for severance were enumerated thus:

- (1) the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains;
- (2) the remaining terms continue to be supported by adequate consideration;
- (3) the removal of the unenforceable provision does not so change the character of the contract that it becomes 'not the sort of contract that the parties entered into at all';⁸⁰ and

⁷⁹ [1995] 1 W.L.R. 1461, [1997] 1 W.L.R. 1527.

⁸⁰ These three conditions were set out in *Sadler v. Imperial Life Assurance Co. of Canada Ltd.*, [1988] I.R.L.R. 388 (High Court), which the court adopted in *Marshall*.

- (4) severance must be consistent with the public policy underlying the avoidance of the offending term.⁸¹

From the foregoing, it is compelling to observe that severance of the controversial aspect from the arbitration clause could satisfy virtually all the conditions. To this extent, the issue of public policy (i.e., encouraging parties to resolve their disputes through out-of-court settlement with less formal processes such as mediation and arbitration), is also germane. One may easily agree that this satisfies the public policy condition. Notwithstanding the foregoing, the Supreme Court did not add its important voice on the issue of severance, which would presumably have been vital to the case itself. Furthermore, it may be concluded that the court deliberately declined to comment and affirm its position on the question of severance since its judgment validates the arbitration clause and the whole contract itself. The question of severance thus did not arise at Supreme Court stage. However, the court 'could usefully have stated that where the overwhelming objective of a defective clause is to have disputes resolved by arbitration, the court will simply excise the objectionable provision'.⁸² The court should always probe to ascertain the intention of the parties as represented by the contract. This seems to be a sustainable approach to the controversy.

So, despite what the Court of Appeal in *Jivraj's* case considered 'discriminatory' in an arbitration clause, it is difficult to render the whole arbitration clause void. Though contract formation issues may be complex in some situations,⁸³ the court should help to make and not mar the possibility of a sustainable settlement while respecting the respective positions of the parties. The validity of an arbitration clause in an underlying contract has been an issue in the United States since the enactment of the Federal Arbitration Act in 1925 (FAA).⁸⁴ Under section 2 of the FAA, an arbitration clause is placed on equal footing with all other contracts.⁸⁵ Egle mentions that:

According to section 2 of the FAA, arbitration clauses are severable from the contracts that contain them. Section 2 states that a written arbitration provision in a contract 'shall be valid, irrevocable, and enforceable'. Thus, the FAA provides that an arbitration clause may

⁸¹ This fourth condition was added in *Marshall v. NM Financial Management Ltd.*, [1997] 1 W.L.R. 1527.

⁸² Adam Samuel, *Opinion: Discrimination, Relief over Jivraj v Hashwani* The Resolver—The Q. Mag. of the Chartered Inst. of Arbitrators 8 (November 2011).

⁸³ See generally Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 Brandeis L.J. 415, 415–61 (2005–06).

⁸⁴ Federal Arbitration Act, 9, U.S. Code, Section 1–14, was first enacted Feb. 12 1925 (43 Stat. 883), codified Jul. 30, 1947 (61 Stat. 669), and amended Sep. 3, 1954 (68 Stat. 1233). Chapter 2 was added Jul. 31 1970 (84 Stat. 692), two new sections were passed by the Congress in October 1988 and renumbered on Dec. 1 1990 (PLS 669 and 702); Chapter 3 was added on Aug. 15, 1990 (PL 101–369); and section 10 was amended on Nov. 15, 1990.

⁸⁵ Andre V. Egle, *Back to Prima Paint Corp. v. Flood & Conklin Manufacturing Co.: To Challenge an Arbitration Agreement You Must Challenge the Arbitration Agreement*, 78 Wash. L. Rev. 199, 200 (Feb. 2003).

be separately enforced unless there are any legal or equitable grounds for its revocation. This conclusion stems from the statute's specific focus on arbitration provisions as separate contractual units.⁸⁶

If this is the case, the same rule of severance between the whole contract and an arbitration clause may also be applied to an arbitration clause and to any controversial clause within it. The Supreme Court of the United States has consistently encouraged arbitration. This strong support for arbitration is evidenced in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,⁸⁷ where the court made special reference to the need to enforce arbitration clauses:

The Arbitration Act calls for a summary and speedy disposition of motions or petitions to enforce arbitration clauses. The Court of Appeals had in the record full briefs and evidentiary submissions from both parties on the merits of arbitrability, and held that there were no disputed issues of fact requiring a jury trial before an order could issue. Under these circumstances, the court acted within its authority in deciding the legal issues presented in order to facilitate the prompt arbitration that Congress envisaged.⁸⁸

So, borrowing a leaf from this position, all doubts in a controversial or defective arbitration clause should necessarily be resolved in favour of the overriding objective of arbitration. However, reasonable caution must be adopted with regard to the setting of a bad precedent, which may give parties the liberty to choose arbitrators from their nationality, religion, or race. The practice of arbitration should cut across religious, racial and national divides. To this end, even though some issues may not arise in a case, the apex court should always take a position that would clarify issues for the wider society rather than complicating the matter by leaving certain vital issues unresolved.

7 CONCLUSION AND RECOMMENDATIONS

With the growing disaffection and objections to certain practices in international arbitration, the courts may be the saving grace in regaining its lost glory. Further complications of issues such as discrimination and bias may result in a total loss of confidence in the process. This research finds that different religions have their unique ways of resolving disputes, the most prominent one being arbitration willingly resorted to by parties who are instinctively influenced by their religious idiosyncrasies. The key examples given in this article relate to African customary arbitration, Christian arbitration and Islamic arbitration. The *Jivraj* case may be classified under the Islamic arbitration tradition where the parties trust their

⁸⁶ *Id.* at 207.

⁸⁷ 460 U.S. 1 (1983).

⁸⁸ 460 U.S. 1, 29 (1983).

leaders with utmost confidence. That in turn may ultimately influence their choice of arbitrators. This is also true of other people who are influenced by their religious, racial or national leanings while constituting an arbitration panel. In fact, we may need further empirical research in the form of a survey among selected parties in arbitration to ascertain whether they are, subconsciously, influenced by their religious, racial or national leanings while appointing arbitrators.

If it is established that the mindset of the parties leads to the building of confidence in the tribunal, then parties should be allowed to decide who to choose as final arbiters for their dispute.⁸⁹ However, their choice at the time of concluding the contract should supersede any other future decision, which might have been influenced by the usual technicalities in the lawyer's mind when a case is brought before him or her. But in the present case, the main point of reference was the 2003 Regulations, which now invalidate such restrictive and exclusive power to appoint arbitrators from a particular religious sect. While we agree with Lord Clarke on the point that arbitrators are 'independent provider[s] of services who are not in a relationship of subordination with the person who receives services' just like judges, that does not necessarily mean any effect should be given to the JVA agreement of 1981. The kind of 'positive discrimination' contained in the JVA agreement is not sustainable, particularly in international commercial arbitration. Thus, while such exclusive provision of the appointment of arbitrators from within a particular sect may not be considered improper for specialized family arbitration, outer space arbitration or Islamic finance arbitration, which require special expertise by arbitrators and who ordinarily share the same idiosyncrasies as that of the parties, arbitration generally should be more inclusive in nature. This, of course, should include general cases of international arbitration such as at issue in *Jivraj*. It is, therefore, contended that such restrictive interpretation of contractual agreements should be limited only to specialized arbitrations.

It is important for UNCITRAL to consider the above recommendations on the use of restrictive arbitration clauses in specialized arbitration and international arbitration in future amendments of its rules. A close perusal of the provisions of the latest UNCITRAL Arbitration Rules (as revised in 2010) does not reveal anything of such nature while laying down the rules on appointing arbitrators.⁹⁰ We have to think ahead as regards emerging issues in international arbitration.

⁸⁹ Party autonomy is highly regarded in the appointment of arbitrators, as it is considered as a binding contract between the parties involved. However, such power or right to appoint arbitrators is sometimes surrendered to a designated appointing authority. See David Altaras, *Selection Criteria: Jivari v Hashwani*, 75 ARBITRATION 574, 575 (No. 4, 2009).

⁹⁰ See the relevant provisions (Arts 8–11 on appointing arbitrators in the UNCITRAL Arbitration Rules (as revised in 2010)).

Distinguishing specialized arbitrations from the usual international commercial arbitration is absolutely necessary in the determination of the applicable rules.

The Court of Appeal decision in the *Jivraj* case seems to be more realistic in terms of the modern nature of international arbitration, which often involves cross-border transactions. However, the premise upon which the decision was made appears defective, as explained above. Laws, regulations and rules are meant to be interpreted in accordance with the realities of the time. Giving strict literal interpretation to certain provisions may not augur well for the future of international arbitration. While arbitrators cannot *stricto sensu* be regarded as employees of the parties, they assume the position of independent neutrals after their appointment. The contractual nexus between the arbitrators and their nominating parties ceases once they have been appointed. This is clear from the perspective of their remuneration, which is usually not determined by an individual party. The remuneration of the arbitrators in a case is often jointly determined and the parties pay for the proceedings jointly. We have not heard of a case where an arbitrator receives more remuneration from his nominating party than the other, except in cases where some sort of additional compensation or gift is given by the winning party which is ordinarily outside the scope of the costs determined by the arbitration panel.⁹¹

In line with the reasoning of the Supreme Court to promote amicable resolution of disputes and the need for confidence, one may suggest that contracting parties should be allowed to consensually stipulate in their arbitration clause their choice of arbitrators on the ground of religion, race or nationality. But it must quickly be added that this should not be to the exclusion of other persons who do not belong to their religious, racial or national leanings. While party autonomy is respected, public policy should not be jeopardized in the practice of international arbitration. Rules of arbitration should give preference to expertise rather than to sectarian leanings in the appointment of arbitrators. This must be expressly stated in the rules of prominent arbitral institutions across the world. Though a binding precedent has been established by the Supreme Court, it is clear that it will take some time before the dust raised by the decision settles in the field of international arbitration.

⁹¹ See Art. 40(2)(a) of the UNCITRAL Arbitration Rules (as revised in 2010).

Guide to Authors

The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at editorjoia@kluwerlaw.com
2. Special attention should be given to quotations, footnotes and references which should be accurate, complete and in accordance with the Journal style sheet, which is available online at www.kluwerlawonline.com/JournalofInternationalArbitration.
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. Please ensure a brief biographical note giving details of the professional/academic status of the author(s) is provided.
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